

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2025-404-000400
[2026] NZHC 681**

UNDER The Judicial Review Procedure Act 2006 and
the New Zealand Superannuation and
Retirement Income Act 2001

IN THE MATTER OF An Application for judicial review of
decisions of the Guardians of New Zealand
Superannuation

BETWEEN MAHER NAZZAL
First Applicant

RAWAA ELHANAFY
Second Applicant

JOHN BERNARD MINTO
Third Applicant

AND GUARDIANS OF NEW ZEALAND
SUPERANNUATION
Respondent

Hearing: 14 and 15 October 2025

Appearances: R E Harrison KC, F M Joychild KC and B A Mugisho for
Applicants
V L Heine KC, J W Upson and M C Grant for Respondent

Judgment: 13 April 2026

**JUDGMENT OF MOUNT J
[Judicial Review]**

*This judgment was delivered by me on 13 April 2026 at 12 pm,
Pursuant to Rule 11.5 of the High Court rules.*

*Registrar/Deputy Registrar
Date:*

Introduction

[1] The Guardians of New Zealand Superannuation is a Crown Entity that manages a sovereign wealth fund with approximately \$86 billion in assets. Parliament established the fund in 2001 to help meet the future costs of superannuation.

[2] The governing statute, New Zealand Superannuation and Retirement Income Act 2001, requires the Guardians to invest the fund on a prudent, commercial basis.¹ Parliament also placed the Guardians under a duty to manage and administer the fund in a manner consistent with:²

- (a) best-practice portfolio management; and
- (b) maximising return without undue risk to the fund as a whole; and
- (c) avoiding prejudice to New Zealand's reputation as a responsible member of the world community.

[3] It is the third of those duties that is in issue in this case: the requirement to manage and administer the fund in a way that avoids prejudicing the nation's reputation as a responsible member of the world community. This duty appears to be unique among comparable funds in at least two ways: it is explicitly imposed by statute, and it uses the concept of avoiding prejudice to the nation's reputation, rather than one of the other phrases or concepts commonly used in the industry such as responsible or sustainable investment.

[4] The Act requires the Guardians to establish, and adhere to, investment policies, standards, and procedures.³ For brevity I will refer to all three as "policy documents". Section 61(d) of the Act says that the policy documents must cover:

¹ New Zealand Superannuation and Retirement Income Act 2001, s 58(2).

² Section 58(2).

³ Section 60(1).

... ethical investment, including policies, standards, or procedures for avoiding prejudice to New Zealand's reputation as a responsible member of the world community ...

[5] In this application for judicial review, the applicants submit the policy documents the Guardians have established in response to the relevant statutory duties do not comply with the "avoiding prejudice" requirement and are to that extent unlawful. Among other things, they seek declarations that the policy documents are unlawful, and that four specific investments are also unlawful as a consequence. In the alternative, they seek declarations that the challenged investments directly breach the duties in the Act.

Background

[6] The applicants are New Zealand citizens. The first and second are Palestinian New Zealanders. The third is the co-chair of the Palestinian Solidarity Network Aotearoa, together with the first applicant. Since approximately 2020, the Palestinian Solidarity Network has lobbied the Guardians to divest its interests in companies said to be complicit in human rights abuses in the occupied Palestinian territories. Guardians had done so previously in 2012, excluding from the fund development and construction companies and a technology company involved in settlements in the occupied territories.

[7] In 2021, after several years of correspondence with the Network, the Guardians excluded five Israeli banks from the portfolio on the grounds there was an unacceptable risk the banks were materially contributing to breaches of human rights standards, and that engaging with the banks was unlikely to be effective. In the years after that decision, representatives of the Network asked the Guardians to exclude other investments from the fund on the grounds of alleged complicity in human rights breaches in the occupied Palestinian territories. The Network and the Guardians exchanged numerous letters on the topic, ultimately focusing on the Guardians' investments in the following four companies:

- (a) Airbnb Inc (approximate value NZ\$18.26 million);
- (b) Booking Holdings Inc (trading and known as Booking.com; approximate value NZ\$48.556 million);
- (c) Expedia Group Inc (approximate value NZ\$467,000); and
- (d) Motorola Solutions Inc (approximate value NZ\$123.330 million).

[8] The Network relied on international material including an advisory opinion of the International Court of Justice regarding the policies and practices of Israel in the occupied Palestinian territory,⁴ and the inclusion of the companies in a database operated by the United Nations Office of the Commissioner of Human Rights, which lists businesses involved in activities that are connected to the Israeli occupation of the territories. The Network also relied on relevant steps taken by the United Nations General Assembly,⁵ Security Council,⁶ and reports of the United Nations Special Rapporteur on the situation of human rights in the occupied Palestinian territory.⁷

[9] The Chief Executive Officer responded on 10 June 2024 that none of the companies “currently meets the exclusion threshold under our Sustainable Investment Framework”. She said the Guardians drew a distinction between a company being directly and materially involved in an activity, versus being a supplier of materials in the normal course of business.

[10] After further correspondence, the Guardians’ Head of Sustainable Investment wrote to the Network on 2 October 2024 and reiterated that none of the companies met the Guardians’ criteria for exclusion from the fund. In relation to the United Nations database, the letter stated:

⁴ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)* [2024] ICJ Rep 753.

⁵ *Advisory opinion of the International Court of Justice on the legal consequences arising from Israel’s policies and practices in the Occupied Palestinian Territory, including East Jerusalem and from the illegality of Israel’s continued presence in the Occupied Palestinian Territory A/RES/ES-10/24 (2024).*

⁶ SC Res 2334 (2016).

⁷ *Francesca Albanese Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese: Genocide as colonial erasure UN Doc A/79/384 (1 October 2024).*

The OHCHR [that is, the Office of the United Nations High Commissioner for Human Rights] list provides a database of companies that OHCHR assesses are involved in a number of specified activities in settlements in the Occupied Palestinian Territories, to be reported to the HRC. The OHCHR report and database does not provide detail of the extent or materiality of those companies' involvement or make a determination on the legal status of any of the listed activities or companies, or provide guidance on how the list should be used. A number of companies we exclude are on the OHCHR list, but a number are not.

[11] There was then more correspondence, and the Network ultimately provided the Guardians with a draft statement of claim foreshadowing the present judicial review application. The respondent was unmoved and said its policies reflected an expert determination in line with a broad statutory discretion.

The statutory context

[12] The Minister of Finance, the Hon Sir Michael Cullen, introduced the New Zealand Superannuation Bill into Parliament in December 2000, describing it as a response to New Zealand's ageing population and rising superannuation costs. The Minister said:⁸

The bill seeks to establish a New Zealand superannuation fund to smooth over time and between generations the future increase in the cost of superannuation. It will finally give superannuitants a much greater certainty about what the Government will be able to provide for them, and will allow us to maintain a universal pension that guarantees a basic minimum decent standard of living.

The fund will build up for around the next 25 years in order to meet part of the cost of New Zealand superannuation in the future, and by requiring the government to set aside funds it will ensure that these long-term cost pressures are taken into account in annual fiscal decisions. Sound fiscal management will be crucial to ensuring the government can make the required contributions to the fund and meet its other fiscal priorities.

[13] He emphasised the need to uphold New Zealand's reputation without pinning the fund down with so many conditions that it could not generate appropriate levels of returns:⁹

⁸ (13 December 2000) 589 NZPD at 7420–7421.

⁹ At 7422.

The board will be responsible for determining and executing investment strategy for the fund. It will be required to manage the fund on a prudent commercial basis in a manner that is consistent with best portfolio management techniques and that seeks to maximise returns without bringing undue risk to the fund as a whole. Investment decisions must be consistent with ethical considerations. The investments undertaken must uphold the reputation of New Zealand as a responsible member of the world community.

The Government is happy to include this provision because it would clearly be inappropriate to have a Government-linked fund investing in, say, corrupt political regimes or anti-social activities. We must at the same time ensure—and this is a clear balance that, I think, the Select Committee has to consider very carefully—that we do not pin the fund down with so many conditions and criteria that it is unable to generate the level of returns it needs to perform its primary function. ...

[14] The Finance and Expenditure Select Committee considered the Bill in June 2001.¹⁰ It said the fund would have one purpose, to assist the Crown in meeting future superannuation payments.¹¹ In fulfilling that purpose, the Board would be required to invest the fund in a manner consistent with two objectives:¹²

- Prudent, commercial management of the fund; and
- Recognition that the fund is owned by the Crown and the Crown bears the risks arising from the activities of the fund to both its finances and its reputation.

[15] The Committee said the Guardians “must avoid prejudicing” New Zealand’s reputation as a responsible member of the world community, and did not see that as conflicting with the ultimate purpose of the fund to meet future superannuation payments.¹³

The majority of us consider the current approach of the bill balances the objectives of the fund in a manner that does not conflict with its ability to meet its purpose of assisting the Crown in meeting future NZS payments. In doing this the Board is able to consider ethical investment issues and must avoid prejudicing New Zealand’s reputation as a responsible member of the world community.

The majority of us recommend a change to the bill in this area to clarify the relationship between clauses 58(c) and 61(d). We recommend that clause 61(d) be omitted and replaced with the words “ethical investment, including (policies, standards and procedures) for avoiding prejudice to New Zealand’s reputation as a responsible member of the world community; and”.

¹⁰ New Zealand Superannuation Bill 2000 (89-2) (commentary).

¹¹ At 6.

¹² At 6.

¹³ At 7.

This provides a stronger link between the manner in which the Board is required to invest the fund and its statement of investment policies, standards and procedures.

[16] In May 2001, a joint report from the Treasury and Ministry of Social Policy to the Finance and Expenditure Select Committee emphasised that the Bill did not direct the fund to undertake any specific ethical investment practices.¹⁴ Rather, it required the Board to state the policies, standards and procedures it would follow.¹⁵ It was appropriate to leave it to the Board to determine the content of those policies, standards and procedures. The alternative would be for the legislation to state explicitly what was meant by “ethical investment”, or to allow the Government to direct the Board on ethical investment issues. However, approaches to ethical issues could change over time, and defining them in legislation would require legislative amendment to reflect future changes. It would also be problematic to enable the Government to direct the Board on ethical investment, which could reduce the Board’s independence.¹⁶

... If the government were able to do so, this would increase the level of involvement of the government in the Fund, create a situation where governments could potentially present political investment preferences as ethical directions and reduce the independence and accountability of the board.

[17] Against that background, the Act sets out the relevant duties in the following three sections:

58 Investment of Fund

- (1) The Guardians are responsible for investing the Fund.
- (2) The Guardians must invest the Fund on a prudent, commercial basis and, in doing so, must manage and administer the Fund in a manner consistent with—
 - (a) best-practice portfolio management; and
 - (b) maximising return without undue risk to the Fund as a whole; and
 - (c) avoiding prejudice to New Zealand’s reputation as a responsible member of the world community.

¹⁴ Treasury and Ministry of Social Policy *Joint Treasury/Ministry of Social Policy Departmental Report to the Finance and Expenditure Select Committee on the New Zealand Superannuation Bill* (14 May 2001) at [69].

¹⁵ At [69].

¹⁶ At [70].

60 Establishment of investment policies, standards, and procedures

- (1) The Guardians must establish, and adhere to, investment policies, standards, and procedures for the Fund that are consistent with their duty to invest the Fund on a prudent, commercial basis, in accordance with section 58.
- (2) The Guardians must review those investment policies, standards, and procedures for the Fund at least annually.

61 Contents of statements of investment policies, standards, and procedures

A statement of investment policies, standards, and procedures must cover (but is not limited to)—

...

- (d) ethical investment, including policies, standards, or procedures for avoiding prejudice to New Zealand's reputation as a responsible member of the world community;

...

[18] I refer to “duties” in this context because of the mandatory language in the Act. The respondent referred to “obligations”, but I do not think anything turns on the terminology in this context.

[19] The Act requires the Chairperson of the Board and the Chief Executive to certify each financial year in the annual report whether or not the fund has complied with its investment policies, standards, and procedures throughout that financial year.¹⁷ There are also other accountability mechanisms. They include five-yearly performance reviews by an independent person appointed by the Minister.¹⁸ The reviews must address whether the investment policies, standards, and procedures are appropriate for the fund and have been complied with in all material respects.¹⁹ The independent reviewer must prepare a written report setting out their conclusions and recommendations for the Minister to present to the House of Representatives.²⁰

¹⁷ New Zealand Superannuation and Retirement Income Act, s 68(f).

¹⁸ Section 71.

¹⁹ Section 71(4).

²⁰ Section 71(6) and (7).

[20] The respondent emphasised the importance of maintaining the Guardians' independence and highlighted that there are limits to the directions the Minister can give.²¹ Overall, the respondent emphasised the mechanisms in the Act to ensure the fund can achieve its commercial purpose free from undue political interference. Perhaps paradoxically, the respondent also submitted that the remedy for the applicants' concerns about the challenged investments is political.

Responsible and sustainable investment

[21] The respondent filed a contextual affidavit from Simon O'Connor, a Director of Bank Australia, to provide an overview of industry practice including the concepts of ethical, responsible, and sustainable investment. He described practices among other sovereign wealth funds and institutional investors, and international standards and guidelines that are commonly used in the industry.

[22] Mr O'Connor used the phrase "responsible investment" as an umbrella term incorporating ethical investment, sustainable investment, and "ESG investing" (an acronym for economic, social and governance investing). He said at times the terms are used interchangeably, but leading organisations have clear definitions of the terms documented in their policies.

[23] Mr O'Connor emphasised that the field of responsible investment is complex and evolving. Large asset owners need a sophisticated framework with clearly defined criteria, rules and thresholds, and clear definitions of the relevant terms. Individual assessments of conduct-based breaches will inevitably require some degree of subjective assessment. But there are "clearly articulated global standards that guide responsible investors on what constitutes a leading responsible investment approach". There are applicable standards and principles in several prominent and globally accepted documents including the *UN Global Compact*, the *UN Guiding Principles on Business and Human Rights*, and other similar documents.²²

²¹ Section 64.

²² *After the Signature: A Guide to Engagement in the United Nations Global Compact* (UN Global Compact Office, 2012); and *Human rights and transnational corporations and other business enterprises A/HRC/RES/17/4* (2011). See also *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* UN Doc HR/PUB/11/4 (January 2012); and John Ruggie *Report of the Special Representative of the*

Preliminary issues

Justiciability

[24] The respondent took a preliminary point as to justiciability. It argued its compliance with the requirements of s 58 of the Act is not justiciable or otherwise amenable to review. The respondent submitted there is no applicable legal yardstick, and it would be constitutionally inappropriate for the Court to adjudicate on this judicial review.

[25] As a starting point, I respectfully agree with Woolford J in *Mohamed v Guardians of New Zealand Superannuation* that it is a justiciable question whether the respondent has established, and adhered to, an investment framework consistent with its obligations under the Act.²³ Put another way, it is a justiciable legal question whether Guardians has established policy documents that comply with the statutory duties. I am satisfied there is a suitable legal yardstick, namely compliance with the duties in the Act, and there is nothing constitutionally inappropriate about the Court adjudicating on the issue. To the contrary, it is the role of the Court to interpret and apply the statutory requirements that Parliament has enacted.

[26] The respondent argued that this case is analogous to *Curtis v Minister of Defence*.²⁴ That was a challenge to the Minister of Defence's decision to disband the air combat force of the Royal New Zealand Air Force in 2001. The Court found it was fundamentally a policy choice for the executive what level of combat capability the country should have. There was no free-standing legal standard by which to assess how well-armed the air force should be. Nor did the statute provide such a standard. The Court said:²⁵

[28] In the present case it is not fairly arguable that the Minister's decision has completely disarmed the RNZAF. The only issue is whether his decision has left the RNZAF insufficiently armed. But that is par excellence a non-justiciable question. It is a question which is not susceptible of

Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie UN Doc A/HRC/17/31 (21 March 2011).

²³ *Mohamed v Guardians of New Zealand Superannuation* [2021] NZHC 512, [2021] 2 NZLR 612 at [79].

²⁴ *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA).

²⁵ Above n 24.

determination by any legal yardstick. Furthermore it is one of government policy into which it is constitutionally improper for the Courts to go.

[27] But the present case is different. Parliament has enacted specific legal duties and required the respondent to comply with them. It is the role of the courts to determine whether the respondent has done so. For the reasons set out below, it is unnecessary in this case to go beyond the conclusion that the lawfulness of the policy documents themselves is a justiciable question.

Standard of review

[28] In the alternative, the respondent submitted there should be a “light touch” standard for judicial review, citing *New Zealand Independent Community Pharmacy Group Inc v Health New Zealand* in support.²⁶ In that case, the Court of Appeal considered whether the commercial context of Health New Zealand’s decision-making meant the grounds of review were limited to fraud, corruption or bad faith.²⁷ The Court did not favour limiting the scope of review in that way, and emphasised that the legality of a decision turns on whether it is consistent with the statute under which it is made.²⁸ The statutory and factual context are central.²⁹ The Court did however recognise that a statute can leave considerable discretion to a decision-maker:

[62] We do, however, agree with HNZ that the empowering statute left considerable discretion to a DHB about the service agreements that were to be entered into in pursuit of the DHB’s statutory objectives. The scope of that discretion is relevant to whether any ground of review is established. But it is wrong to take the approach that, because the service agreement was awarded to a provider in a competitive market for the provision of those services, the scope of judicial review was limited to fraud, corruption, bad faith or analogous circumstances. ...

[29] I do not interpret *New Zealand Independent Community Pharmacy* as supporting a general proposition that there should be a light touch standard of review in the commercial context, but rather that the relevant obligations are driven by the terms of the empowering statute and the relevant factual context. Equally, the nature

²⁶ *New Zealand Independent Community Pharmacy Group Inc v Health New Zealand* [2025] NZCA 443.

²⁷ At [52]–[53] referring to *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) at 391.

²⁸ At [59].

²⁹ At [54].

and extent of discretion afforded to the decision-maker are determined by the statutory and factual context.

[30] The respondent also relied on *Unison Networks Ltd v Commerce Commission*, to submit that the court should not intervene in the decision of an expert public body with broad discretion, absent bad faith, material misapplication of the law, or improper purpose.³⁰ It is true that in the context of a broadly-expressed regulatory discretion vested in an expert body, the Supreme Court said that the courts are unlikely to intervene unless the body exercising the power has acted in bad faith, materially misapplied the law, or exercised the power in a way which cannot rationally be regarded as coming within the statutory purpose. But the Court said the ultimate question is whether the decision-maker (in that case the Commerce Commission) exercised its powers in accordance with the requirements of the statute, for the purpose and within the scope of the authority conferred by Parliament.³¹ Again, the key questions are what does the statute require? And what is the relevant factual context?

[31] More broadly, Radich J recently summarised the authorities on the concept of a variable standard of review.³² He concluded:

[93] I agree with Cooke J's view that the intensity with which the court reviews whether a decision-maker has made their decision in accordance with law should not vary. Judicial review exists to ensure the lawfulness of exercises of power with a public substance or public effects.³³ Using different adjectives to describe how intensely the Court should review a given exercise of power can distract from this purpose. As Cooke J noted, the nature and extent of legal restraints on a decision-maker's powers will vary markedly between cases, but the intensity with which the Court reviews whether any given exercise of power remained within lawful limits ought not to vary.

[94] That said, judicial review is an inherently discretionary remedy and factors that a court would potentially consider in a variable intensity of review analysis – such as the private and political nature of the decision-making body at issue – can be taken into account in determining whether (where a cause of action is made out) to grant relief and, if so, what it should be.

³⁰ *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [55].

³¹ At [50].

³² *Kapa-Kingi v Tamihere* [2026] NZHC 517 from [87].

³³ *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [1]; and *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) at 11 and 12.

[32] I mention the debate over standards of review because of the respondent’s use of the phrase “light touch”, which appears to invoke the concept of a variable, and lighter, standard of review applying to decisions by the Guardians. The extensive academic and judicial discussion of variable standards of review shows that forty years after Sir Robin Cooke described the struggle for simplicity in administrative law, that struggle is not entirely over.³⁴ But whatever the merits of the different conceptual schemes, it seems to me that the concept of light touch judicial review is ultimately a red herring in this case. I do not think it is necessary to go any further than the governing statute to determine the nature and extent of Guardians’ obligations. Guardians must correctly interpret and comply with the requirements of the statute. In this context, a failure to do so could be conceptualised either as illegality or unreasonableness. Either way, the key inquiry is what the statute requires Guardians to do.

[33] As to illegality, Lord Diplock described the test as follows in *Council of Civil Service Unions v Minister for the Civil Service*:³⁵

By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

[34] Put another way, the duty on the Guardians is to interpret and apply the law correctly.³⁶

[35] As to unreasonableness, it is a well-established principle that a policy made under a statute must be reasonable,³⁷ and within the bounds of what Parliament authorised.³⁸ The majority of the Supreme Court upheld an immigration policy

³⁴ Robin Cooke “The Struggle for Simplicity in Administrative Law” in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, Auckland, 1986) 1.

³⁵ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 410.

³⁶ For example, see *Commissioner of Inland Revenue v Chatfield & Co Ltd* [2019] NZCA 73, [2019] 2 NZLR 832 at [52].

³⁷ *H (SC 104/2020) v Minister of Immigration* [2021] NZSC 192 at [24].

³⁸ See for example *Practical Shooting Institute (NZ) v Commissioner of Police* [1992] 1 NZLR 709 (HC) at 718.

in *H (SC 104/2020) v Minister of Immigration* on the grounds that it was “not unreasonable, unfair or ultra vires”.³⁹ The unreasonableness test is a high standard.⁴⁰

[58] Like regulations, rules and bylaws, government policies made under a statute must be reasonable.⁴¹ They will be unreasonable if they are policies that no reasonable decision-maker could have promulgated, or if they are “outside the limits of reason” – the test is a stringent one.⁴² Put another way, the immigration instructions will be ultra vires if they are so unreasonable that their making would not have been contemplated by Parliament as empowered by the Immigration Act 2009.⁴³ Any policy which guides the exercise of a statutory power “must be based on factors and purposes relevant to the power”.⁴⁴

[36] The passage above highlights the way that unreasonableness can overlap with illegality in some cases: a policy will be unreasonable if its making “would not have been contemplated by Parliament as empowered by” the relevant Act.⁴⁵ That is similar to the formula Tipping J adopted in *Practical Shooting*, which focused on whether parliament authorised the relevant policy,⁴⁶ and the *Unison* test whether the decision-maker “exercised its powers in accordance with the requirements of the statute”.⁴⁷ However the analysis is conceptualised, all roads lead to the requirements of the Act. I return to that question shortly.

Standing

[37] The respondent submits the applicants do not have either personal or public interest standing to bring the present judicial review proceedings. It submits they have strongly held political beliefs, but not legal standing to bring this case. As Woolford J summarised in *Mohamed*, the principles of standing are settled in New Zealand.⁴⁸

[60] ... There are broadly two types of standing: personal and public interest. Personal standing is concerned with whether an applicant’s personal rights and interests are affected by the decision under

³⁹ *H (SC 104/2020) v Minister of Immigration*, above n 37, at [32].

⁴⁰ Per Winkelmann CJ (dissenting).

⁴¹ At [24].

⁴² *Criminal Bar Association of New Zealand Inc v Attorney-General* [2013] NZCA 176, [2013] NZAR 1409 at [136] citing *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA) at 131 per Cooke P and *Wellington City Council v Woolworths (New Zealand) Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 545 per Richardson P.

⁴³ See *Turners & Growers Exports Ltd v Moyle* HC Wellington CP720/88, 15 December 1988 at 49.

⁴⁴ *Criminal Bar Association*, above n 42, at [119].

⁴⁵ *H (SC 104/2020) v Minister of Immigration*, above n 37, at [58] per Winkelmann CJ (dissenting).

⁴⁶ *Practical Shooting Institute (NZ) v Commissioner of Police*, above n 38, at 715–716 and 718.

⁴⁷ *Unison Networks Ltd v Commerce Commission*, above n 30, at [50].

⁴⁸ *Mohamed v Guardians of New Zealand Superannuation*, above n 23.

challenge. Public interest standing, on the other hand, is more concerned with whether the decision under challenge is, or may be, unlawful.

[61] While the requirements of standing in judicial review proceedings have been significantly relaxed in New Zealand, it is not so relaxed that it is horizontal.⁴⁹

[62] The House of Lords considered the issue of standing in judicial review cases in depth in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd*.⁵⁰ There, Lord Wilberforce, in his speech reflecting the views of the majority of the House, summarised the standing requirements as follows:⁵¹

“There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application: then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In these it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties and to the breach of those said to have been committed. In other words, the question of sufficient interest can not, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule [of court] requires sufficient interest *in the matter to which the application relates*.”

[63] His Lordship’s speech was soon adopted by the New Zealand Court of Appeal.⁵² Accordingly, Somers J summarised the position in New Zealand as follows:⁵³

“It may now be said that until the nature and scope of the statutory duty in issue has been ascertained and the nature and quality of its breach (if any) found it will not ordinarily be practicable or right to determine whether there is standing to maintain an action.”

[64] Therefore, the context and substantive law are relevant to standing. And, except in relation to clearly untenable claims to standing, challenges to standing are determined as part of the substantive

⁴⁹ *Smith v Attorney-General* [2017] NZHC 1647, [2017] NZAR 1094 at [2] and [18].

⁵⁰ *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL).

⁵¹ At 630 (emphasis in original).

⁵² *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216 (CA); and *Consumers Co-operative Society (Manawatu) Ltd v Palmerston North City Council* [1984] 1 NZLR 1 (CA).

⁵³ *Consumers Co-operative Society (Manawatu) Ltd v Palmerston North City Council*, above n 52, at 6.

hearing of the case. Indeed, as Palmer J recently observed, “it is difficult to divorce questions of standing from the merits of the application of the law of judicial review to a particular factual context”.⁵⁴

[38] The applicants submit they have public interest standing to bring the present proceedings. They individually and collectively have a bona fide interest in seeking a determination of the lawfulness of the policy documents, which is a matter of public interest.

[39] I am satisfied that the applicants do have standing to bring these proceedings. Parliament has imposed legal duties on the Guardians, and the purpose of those duties is a matter of public interest — ensuring that public money is not invested in a way that harms the nation’s reputation. There are arguable questions arising on the facts, and the applicants have a genuine and legitimate interest in seeking the determination of those questions in this Court.

First ground of review — lawfulness of the Guardians’ investment policies, standards, and procedures

The challenged policies

[40] The first ground of review focuses on the two documents the Guardians have established to comply with the statutory duties:

- (a) part nine of the statement of investment policies, standards, and procedures; and
- (b) the sustainable investment framework.

[41] For convenience, I will continue to use the phrase the “policy documents” to refer to these. Their inter-relationship is slightly awkward. Part nine of the first policy document repeats most of the second, word for word. It then cross-references to part four of the second policy document, which is headed “procedures”. Put another way, the second document repeats almost all of part nine of the first but adds a section on procedure.

⁵⁴ *Smith v Attorney-General*, above n 49, at [26].

[42] In short, the applicants submit the relevant parts of the policy documents are unlawful because they do not contain effective standards or procedures for avoiding prejudice to New Zealand’s reputation, do not require the evaluation of specific investments, do not refer to relevant international standards, and are not capable of being applied consistently with the Act.

[43] The respondent submits the policy documents do comply with the Act. The Guardians argue they have a broad discretion, and the documents reflect their expert determination of what is necessary and consistent with global best practice.

The evolution of the policy documents

[44] As Parliament contemplated, the respondent has frequently amended the policy documents over time. Before considering the current versions, it is helpful to set out their evolution and the surrounding context in a little more detail.

[45] A logical starting point is the 2020 version of the policy. That version differed from the current policy documents in some potentially important ways. It identified the following standards and benchmarks:

- (a) principles 1 to 6 of the *Principles for Responsible Investment*;
- (b) all principles of the *UN Global Compact*; and
- (c) a generic reference to “other good practice standards”.

[46] Under the heading “standards for companies” the 2020 policy referred to several sets of standards, including the *UN Global Compact*. It described these as universally recognised by the world community — with signatories including investment managers, investee companies, and the peers of Guardians — and unlikely to be superseded.

[47] The 2020 policy specifically referred to human rights, and stated the applicable principles were based on the *UN Global Compact*, namely:

- (a) support and respect human rights; and
- (b) “no complicity in abuses”.

[48] As noted, the document also referred to the *Principles for Responsible Investment* or “PRI”, described further below.

[49] The 2020 policy set out procedures, with a flowchart to show the overall procedure for the ownership of securities. There were specific procedures for engagement with companies. It stated that if companies did not respond to engagement or if engagement was unlikely to be effective, the Guardians could consider whether exclusion was appropriate.

[50] The 2020 policy set the following threshold for the exclusion of government bonds as provided below.

The fund will exclude investment in the government bonds of any nation state where:

- There is widespread condemnation or sanctions by the international community and New Zealand has imposed meaningful diplomatic, economic or military sanctions aimed at that government.

[51] In relation to companies, the 2020 policy stated that the fund would exclude securities issued by companies in some limited cases, including “where companies are involved in certain activities or *breaches of standards*”.⁵⁵ The document stated Guardians would exercise judgement in making those decisions and take account of a series of listed relevant matters.

[52] There was a challenge to those documents in the case of *Mohamed*, which was argued in October 2020.⁵⁶ The focus in that case was the fund’s investments in Western Sahara. The applicants argued it was not open to the Guardians to use the *UN Global Compact* and the other standards referred to in the framework as a proxy for the statutory criterion of avoiding prejudice to New Zealand’s reputation.

⁵⁵ Emphasis added.

⁵⁶ *Mohamed v Guardians of New Zealand Superannuation*, above n 23.

[53] Woolford J noted that the policy relied on the *UN Global Compact* and the *Principles for Responsible Investment*, which he described as “international benchmark standards”.⁵⁷ He stated:

[21] ... the Compact provides a set of standards by which Guardians can assess the ESG performance of the companies they invest in. [The Head of Responsible Investment’s] affidavit states:

“5.28 ... These standards are specifically intended to meet the requirements of our Act to adopt standards and to manage risk to the Fund’s reputation and New Zealand’s reputation from our activities.” ...

[54] Woolford J concluded that Guardians could not be criticised for formulating its policies, standards and procedures based on widely accepted international standards.⁵⁸ He said the Guardians used the 2020 policy to manage and administer the fund in a manner consistent with avoiding prejudice to New Zealand’s reputation as a responsible member of the world community. He declined review on that ground.

[55] He also rejected the submission that Guardians had fettered its judgement when stating that exclusion of investments would be “rare” and for “severe breaches”.⁵⁹ Rather, this was the setting of a high threshold, and there were good reasons for that approach.⁶⁰

Israeli banks decision

[56] In early 2021, the Guardians excluded securities issued by several Israeli banks from the portfolio. The underlying Investment Committee paper is a useful example of the way the Guardians applied the 2020 policy. Among other things, the paper stated that:

(a) The Guardians used the *UN Global Compact* principles as “a benchmark for expected standards of corporate behaviour”.

⁵⁷ At [21].

⁵⁸ At [28].

⁵⁹ At [29].

⁶⁰ At [29].

- (b) It applied the principle that companies “should avoid being complicit in human rights abuses”.
- (c) The issue Guardians had to address was whether the banks were “breaching these standards due to the human rights abuses caused by the construction of those settlements.”
- (d) The information available to Guardians led them to conclude that the banks were materially in breach of Principle 1 and Principle 2 of the *UN Global Compact*.

[57] In other words, the Investment Committee paper used the *UN Global Compact* standard of “avoiding complicity in human rights abuses” as the standard against which to measure the conduct of the relevant companies. The 2020 policy set out that standard, and the internal papers showed how the Guardians applied it in practice.

[58] The Guardians used an in-house template to help assess whether there had been a breach of the relevant standards. The template identified the specific standards being applied, namely the two relevant principles from the *UN Global Compact*. It concluded there had been a breach of those benchmark standards:

Summary: Given the special circumstances pertaining to the OPT, the clear positions by the United Nations and New Zealand Government on the unlawful nature of the settlements, and the nature of their involvement in the settlements, there is an unacceptable risk in our view, based on the information available to us, that the banks are in breach of the *UN Global Compact* Principle 1. to support international human rights and Principle 2. to avoid complicity in breaches of human rights, and that this breach is severe, long-term and ongoing.

A number of reports have concluded that the construction of Israeli settlements in the OPT cause or contribute to breaches of Palestinian human rights including the right to self-determination, non-discrimination, freedom of movement, and rights to education, water, housing, and an adequate standard of living. The planned intensification of settlement activity will exacerbate the infringement of these human rights.

Under our [Responsible Investment] Framework we use the *UN Global Compact* principles as a benchmark for expected standards of corporate behaviour (our [Responsible Investment] standards for companies). Principle 1 asks companies to support international human rights and Principle 2 provides that businesses should avoid being complicit in human rights abuses. There is credible evidence that the Israeli Banks provide finance

for the construction of Israeli settlements in the OPT. We have accordingly considered whether, by providing that finance, the Israeli Banks have materially breached these UN Global Compact Principles.

[59] The Guardians decided to exclude the named banks.

Decision to amend the policies

[60] The High Court released the *Mohamed* decision in March 2021, concluding that the 2020 policy framework complied with ss 58, 60 and 61 of the Act. The respondent amended its policy documents several times after that. In June 2022, the Guardians edited the documents “to reduce content to aid clarity and focus on key procedures”. Among other things the amendments took out references to the *UN Global Compact*, and other substantive content. I return to the effect of those amendments shortly.

Application of the policy documents

[61] The parties filed more than 2,800 pages of evidence in this judicial review. Not all of it was strictly relevant, but among other things it provided a picture of the way the Guardians have applied the policy documents in practice. A helpful starting point is the Chief Executive Officer’s letter to the Network of 10 June 2024. As already noted, it stated that the challenged investments did not meet “*the exclusion threshold* under our Sustainable Investment Framework”.⁶¹ That implies that the Guardians see the policies as establishing an exclusion threshold, to be applied to specific companies or investments. As summarised above, that was the way the Guardians applied earlier iterations of the policy documents, for example in the Israeli banks decision, which used the *UN Global Compact* as a benchmark.

[62] However, the evidence did not disclose decision-making anchored in a clear exclusion threshold derived from the policy documents. Rather, the evidence showed an inconsistent approach, with references to several different possible thresholds not found in the policy documents:⁶²

⁶¹ Emphasis added.

⁶² Emphasis added (a)–(f).

- (a) The Chief Executive Officer’s letter to the Network on 10 June 2024 stated that the Guardians evaluate “the *proximity or importance* of a company’s actions to the relevant activities”. That test is not contained in the policy documents.
- (b) A letter from the Head of Sustainable Investment on 2 October 2024 said that companies had been excluded because of an unacceptable risk of a “*severe breach of human rights standards*”. The “severe breach of human rights standards” test is (and was) not contained in the policy documents.
- (c) An affidavit from the Head of Sustainable Investment stated that in relation to the occupied Palestinian territories, “our key focus has been and remains the *actual construction and development* of the Israeli settlements that the UN and New Zealand considers to be illegal. This focus ensures our attention is targeted towards areas where there is the most serious risk of material breaches of standards of good corporate practice”. However, it is not clear that the threshold of “actual construction and development” of the settlements was a formal decision of the Guardians, or derived from any written policy.
- (d) The affidavit stated that “one of our areas of focus is analysing the portfolio to identify companies that may *significantly breach standards of good corporate practice*”. However, the threshold “significantly breach” does not appear in the policy documents and suggests a higher test than a “*serious risk* of breaches of standards of good corporate practice” as stated in the policy documents. There is also no articulation of the “standards of good corporate practice” that may trigger further analysis.
- (e) The Head of Sustainable Investment’s affidavit stated that “one of the ways we prioritise the issues and companies we focus on is to analyse the *materiality and directness* of an investee company’s involvement

with the potential breach of good corporate practice standards”. The directness requirement is not contained in the policy documents.

- (f) In relation to the four challenged investments, the Head of Sustainable Investment noted that an external provider, MSCI (formerly Morgan Stanley Capital International), did not identify “*severe or very severe controversies*” relating to human rights. However, the “severe” or “very severe”, thresholds do not feature in the policy documents.

[63] In short, the evidence did not disclose a consistent application of clear thresholds or standards derived from the policies. Nor did the evidence demonstrate consistent adherence to any written procedures, for example setting out who would decide key issues and when.

Assessment

The statutory requirement

[64] The starting point is the words of the statute. Here, the Act requires the Guardians to establish and adhere to the policy documents. The Act does not mandate particular standards to use or procedures to follow. Those are primarily choices for the Guardians, as long as they are consistent with the statutory text and purpose. The legislative history makes it clear this was a deliberate choice in order to respect the Guardians’ independence and to preserve flexibility.

[65] However, in enacting ss 58(2)(c), 60, and 61 of the Act, Parliament placed the Guardians under specific duties.⁶³ The policy documents are the mechanism to comply with those duties. The Act makes it clear that it is not enough for the Guardians to establish the policy documents. They must adhere to and comply with them, in a way that can be internally and externally reviewed and certified:

- (a) The Act specifies that the Guardians *must adhere to* the policy documents.⁶⁴

⁶³ Set out at [17] above.

⁶⁴ New Zealand Superannuation and Retirement Income Act, s 60.

- (b) The Chair and Chief Executive *must certify* in each annual report, which is tabled in Parliament and published, that the policies, standards and procedures have *been complied with*.⁶⁵
- (c) The external review process must similarly examine whether the fund *has complied with* the policy documents.⁶⁶ Each review must be presented to Parliament.

[66] To enable meaningful application and review, the policy documents must identify with sufficient clarity the standards and procedures the Guardians will adhere to. Otherwise, the requirements for adherence, certification, and external review would be illusory.

[67] The reference to standards implies ascertainable benchmarks or criteria. Standards need not have the prescriptive quality of hard-edged rules.⁶⁷ They may be open-textured and involve an element of evaluation or value judgment against a benchmark or norm. But they must be intelligible. A standard often leaves room for discretion or balancing. But standards do not imply unconstrained discretion.

[68] The statute also requires “procedures”. A procedure is a defined process. This implies an articulation of the steps to be followed, by whom and according to what methods, in other words:

- (a) Who will make the relevant decisions;
- (b) How they will make them (that is, by what process); and
- (c) What standards, thresholds, and criteria they will apply.

⁶⁵ Section 68.

⁶⁶ Section 71.

⁶⁷ For deeper jurisprudential analysis of the difference between rules, principles, and standards see Torstein Eckhoff “Guiding Standards in Legal Reasoning” (1976) 29 C.L.P 205; Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge (MA), 1978) at 22; and William Twining and David Miers *How To Do Things With Rules* (5th ed, Cambridge University Press, 2010) at 82.

[69] The content of the policy documents should therefore be clear, ascertainable and capable of being applied consistently.⁶⁸ The policy documents should enable decisions that can be meaningfully reviewed when measured against their content. Those requirements follow from the terms and scheme of the relevant sections of the Act. If the policy documents do not meet these basic standards, in my view they are not consistent with the requirements of the Act and are not reasonable.

[70] That conclusion is required as a matter of statutory interpretation. It is also consistent with the factual context, and with fundamental principle. Standards and procedures enable rational, predictable, and fair decision-making. In this context, the stakes will often be high. As the Select Committee observed, the Guardians are investing public money, and the Crown (in effect the nation) bears the reputational risk. There is also a risk of harm to businesses adversely affected by exclusion decisions. In short, there are good reasons for consistent, fair decision-making according to known standards and criteria, following clear processes. Indeed, the respondent's witness Mr O'Connor described the need in this context for "clearly defined criteria", "clear rules and thresholds", and decisions that are "transparently disclosed and consistently applied".

[71] More broadly, policies exist in part to promote consistent decision-making.⁶⁹ They help avoid arbitrariness. For example, in *Pora v Attorney-General* one purpose of the relevant guidelines was to ensure a consistent approach to the assessment of compensation.⁷⁰ As Ellis J said:⁷¹

Treating like cases alike, is the bedrock of rationality and the very reason for the Guidelines' existence.

[72] Similarly, the Supreme Court said in *Ririnui v Landcorp Farming Ltd*:⁷²

Both rule of law considerations and the need for rationality in public decisions mean that consistency of treatment has a role to play in judicial review when issues of arbitrariness or unreasonableness are raised.

⁶⁸ *H (SC 104/2020) v Minister of Immigration*, above n 37, at [33] and [51].

⁶⁹ See Hanna Wilberg *Administrative Law in Aotearoa New Zealand* (Hart Publishing, Oxford, 2025) at 228.

⁷⁰ *Pora v Attorney-General* [2017] NZHC 2081, [2017] 3 NZLR 683 at [115].

⁷¹ At [121].

⁷² *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [95].

[73] I do not suggest that the policy documents need to be prescriptive or drafted as if they were legislation. Inevitably, their application will require judgement.⁷³ But in my view they do need to meet the basic requirements set out above in order to be lawful and reasonable.

Do the current policy documents meet the minimum statutory requirements?

[74] As noted above, the Guardians decided in 2022 to “reduce content” from the policy documents. Subsequent decisions have progressively removed substance from the policy documents in meaningful ways.

[75] The documents now address the decision whether to exclude securities in two main paragraphs:

4.8 Exclusions: In some limited cases the Fund will exclude securities issued by companies from the portfolio. This may occur where we identify companies that are involved in certain products or consider there is serious risk of material breach of standards of good corporate practice by an investee company and we believe exclusion is the appropriate course of action.

...

4.11 We need to exercise judgement in making our sustainable investment decisions. Analysis to support our monitoring, engagement and exclusion decisions may take account of, as relevant:

- The requirements of our mandate
- New Zealand or other national law
- International law, including conventions to which New Zealand is a signatory
- Significant policy positions of the New Zealand Government
- Significance of the Fund’s holding
- Impact of exclusion on expected Fund returns
- Actions by our peers
- Strength of grounds to believe a breach of good practice standards may occur, or may have occurred
- The severity of the breach of standards

⁷³ See *Obiaga v Attorney-General* [2023] NZCA 658 at [56].

- Likelihood of success of the relevant course of action
- Efficient use of resources
- Expert or other advice where relevant, and
- Other relevant factors on a case-by-case basis

[76] The operative phrase in [4.8] is “serious risk of material breach of standards of good corporate practice”. There is no definition of that phrase, or reference to specific benchmarks or standards. Rather, there is the set of bullet points in [4.11], preceded by the broad statement:

We need to exercise judgement in making our sustainable investment decisions. Analysis to support our monitoring, engagement and exclusion decisions may take account of, as relevant....

[77] The list of 13 bullet points lacks specificity and amounts to a series of generic or broad categories notable for their lack of discernible boundaries. In combination, the two paragraphs do not provide much in the way of meaningful guidance for decision-making.

[78] More specifically, the editing after the 2022 “reduce content” decision removed important elements from the policy documents. For example:

- (a) There is no longer any reference to the *UN Global Compact*, which Woolford J described as “a set of standards by which Guardians can assess the ESG [economic, social and governance] performance of the companies they invest in”.⁷⁴
- (b) The current policy documents no longer link exclusion directly to any human rights standards. As noted, “good corporate practice” is not defined, other than the non-specific statement: “We use relevant ESG corporate standards to provide guidance for our sustainable investment monitoring and analysis of corporate ESG practice.”

⁷⁴ *Mohamed v Guardians of New Zealand Superannuation*, above n 23, at [21].

- (c) The 2020 policy had several flow charts to set out the procedure the Guardians would follow. The current documents omit the flow charts and describe the relevant processes in very general terms, as discussed below. There is a lack of clarity about who will make the relevant decisions, and how and when they will do so.
- (d) The current policy documents begin with the following very broad statement:

Our sustainable investment approach reflects our belief that environmental, social and governance (ESG) considerations, including climate change, are fundamental to long-term risk and return. Our sustainable investment policies, standards and procedures have been developed to reflect sustainable investment best practice in a way that is consistent with our investment mandate. Applying our sustainable investment policies, standards and procedures supports how we manage and administer the Fund in a manner consistent with avoiding prejudice to New Zealand’s reputation as a responsible member of the world community.

[79] The paragraph above is important, because it explains the purpose of the policy documents. The last sentence, somewhat awkwardly, says that applying the policy documents “supports how we manage and administer the Fund in a manner consistent with avoiding prejudice...”. The phrase “supports how we manage” is an oblique way of describing the role of the policy documents, with a meaning that obscures more than it elucidates.

[80] Under the heading “Standards”, the policy documents make the following non-specific statements:

- 3.1 We refer to relevant international standards for guidance on best practice.
- 3.2 We are committed to the PRI, a globally recognised standard. The PRI principles promote sustainable finance, the integration of ESG issues into investment analysis and active ownership of assets. We use the PRI for guidance on best practice in sustainable investment and to benchmark our own performance.
- 3.3 Our voting policies are guided by national and international standards of good corporate governance. International standards include the International Corporate Governance Network Guidelines. For New Zealand listed companies we endorse the New Zealand

Corporate Governance Forum Guidelines, the NZX Corporate Governance Code and the New Zealand Stewardship Code.

[81] The policy documents do refer specifically to the Principles for Responsible Investment or PRI. However, they are six principles expressed at a high level of generality, which provide no specific benchmark on human rights issues:⁷⁵

1. We will incorporate ESG issues into investment analysis and decision-making processes.
2. We will be active owners and incorporate ESG issues into our ownership policies and practises.
3. We will seek appropriate disclosure on ESG issues by the entities in which we invest.
4. We will promote the acceptance and implementation of the Principles within the investment industry.
5. We will work together to enhance our effectiveness in implementing the Principles.
6. We will each report on our activities and progress towards implementing the Principles.

[82] As to process, the Guardians' policy states:

4 Procedures

- 4.1 Sustainable investment is integrated into the investment activities of the Fund through this Sustainable Investment Framework and its application by the Guardians investment professionals.
- 4.2 Our procedures support our policy objectives and are guided by our sustainable investment standards. Climate change is an integral part of the ESG issues we consider and our Sustainable Investment Framework supports implementation of our climate change investment strategy and the Crown Responsible Investment Framework.
- 4.3 To best satisfy our sustainable investment policy and standards, we utilise the following sustainable investment procedures, as we consider appropriate in the circumstances: Integration, Monitoring, Voting, Engagement and Exclusion. We invest across a wide breadth of investments and therefore need to prioritise the companies and issues we focus our resources on. There will be, from time to time, investments that need special consideration under this Sustainable Investment Framework with respect to exclusion and engagement.

⁷⁵ PRI Association "What are the Principles for Responsible Investment?" <https://www.unpri.org/about-PRI/what-principles-for-responsible-investment>.

- 4.4 We use relevant ESG corporate standards to provide guidance for our sustainable investment monitoring and analysis of corporate ESG practice.

[83] This provides no clarity about how or when the Guardians will make exclusion decisions, and who will make those decisions. The practice of the Guardians appears to have been to treat its investment committee as the body that recommends exclusion, but that has not been documented in the policy documents, and the evidence does not suggest an entirely coherent approach. Counsel advised that the Co-Chief Investment Officers and the Head of Sustainable Investment hold sub-delegated authority to exclude an individual issuer on the recommendation of the investment committee. But the affidavit from the Head of Sustainable Investment left it unclear who the decision-maker was in relation to the challenged investments in this case — indeed, the Guardians pleads that it has made no decisions at all in relation to those investments. That is not easy to reconcile with the Chief Executive Officer’s letter stating that the challenged investments did not meet Guardians’ exclusion threshold.

[84] At least so far as human rights are concerned, the current policy documents are materially less clear and specific than the previous iterations. They have removed the direct reference to the benchmark document from the previous policy, the *UN Global Compact*. The current phrase, “serious risk of material breach of standards of good corporate practice” is not directly linked to any human rights standards, and not defined. The phrase could potentially be used as part of a threshold or benchmark, but the long list of bullet points in [4.11], is too broad to provide any real assistance. Notably, the correspondence filed in this judicial review does not indicate that the Guardians have in fact used “serious risk of material breach of standards of good corporate practice” as the threshold they apply, and nor does Mr O’Connor refer to that phrase in his evidence as having any international recognition. Overall, the policy documents are framed in such general terms as to provide no practical benchmark for those applying them in relation to alleged breaches of human rights standards. There are numerous broad statements in the nature of assertions, but very little if any substantive guidance for those seeking, making, reviewing or subject to exclusion decisions.

[85] It is also undesirable, in my view, that there is only a passing reference to the statutory provisions at the very start of the statement of investment policies, standards, and procedures. The policy documents do not adequately explain the link between the statutory duties and the Guardians' choice of standards and procedures. It is true that the High Court upheld the 2020 policy, but the current policy documents have widened the gap between the statutory duties and operational decision-making.

[86] I accept that Parliament conferred on the Board the primary responsibility to determine the content of the relevant policies, in part because of the evolving nature of the field, and the need for periodic reassessment. I also accept that the Act does not require the respondent to treat any specific international list of companies, such as the UN database, as providing a prescriptive set of answers. However, the policy documents must meet the standards described above. That follows as a matter of statutory interpretation and is consistent with the factual context and the evidence of the respondent's witness Mr O'Connor. So far as exclusion from the fund for alleged breach of human rights standards is concerned, the policies fail to meet the basic requirements of the Act in my view and are therefore unreasonable and unlawful. Put another way, and using the language of *H (SC 104/2020) v Minister of Immigration*, Parliament would not have contemplated the Act empowering policy documents that fall short of those basic standards I have described.⁷⁶

[87] I return below to the question of relief.

Human rights standards

[88] The applicants submitted that the *UN Guiding Principles on Business and Human Rights* are now the definitive global standard setting out how states and businesses should prevent and address human rights abuses linked to business activity.⁷⁷ The *Guiding Principles* are based on the work of the late Harvard Professor John Ruggie and were unanimously endorsed by the United Nations Human Rights Council in 2011.

⁷⁶ *H (SC 104/2020) v Minister of Immigration*, above n 37, at [58].

⁷⁷ See n 22.

[89] The applicants' witness Professor Stanley Lynk described the *Guiding Principles* as providing "very important specific guidance on the international human rights obligations of businesses and investors". He described them as far more authoritative than the PRI (principles for responsible investment) referred to in the Guardians' policy documents. Based on Professor Lynk's evidence, the applicants were critical of the Guardians for failing to apply the *Guiding Principles*, and the lack of any reference to them in the policy documents.

[90] The respondent's witness Mr O'Connor accepted the *Guiding Principles* are useful standards that investors can apply when assessing the human rights practices of portfolio companies. He said in his experience investors use the *Guiding Principles* as "guidance to inform how investors understand and evaluate their portfolio, make decisions and interact with those companies to improve the practices of those portfolio companies". They provide "guidance on expected practices of portfolio companies, and to guide investor expectations and stewardship activities". More generally, Mr O'Connor said:

International guidance on business practices has become incredibly important to guide and inform the practices of responsible investors when assessing the actions of an investee company. Prominent examples of such guidance include the UN Global Compact, the UN Guiding Principles on Business and Human Rights ... and the OECD Guidelines for Multinational Enterprises, among others.

[91] The respondent's witness Sir Michael Wood emphasised that the *Guiding Principles* are not legally binding. He noted the careful language in the New Zealand and United Kingdom fair trade agreement of 2022, which described the *Guiding Principles* as internationally recognised standards, guidelines, and principles of corporate social responsibility:

The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines, and principles of corporate social responsibility that have been endorsed or are supported by that Party, such as the OECD *Guidelines for Multinational Enterprises* and the *United Nations Guiding Principles on Business and Human Rights*.

[92] In short, there appears to be consensus in the evidence that the *Guiding Principles* are broadly supported and relevant international standards.

Nonetheless, the respondent submitted it had “consciously not adopted” the *Guiding Principles* as standards for its own decision-making, because it interprets them as designed for companies to measure their own behaviour, and “cannot be used on their own to decide what, if anything, an *investor* should do in response to a company that may not be upholding these standards”.

[93] However, the belief that the *Guiding Principles* cannot be used “on their own” to decide what the Guardians should do, is not a good reason to omit them from the policy documents. Even the most authoritative and applicable international standards may not dictate a prescriptive answer “on their own”. Moreover, the applicants referred to a 2021 UN Working Group paper that suggests the *Guiding Principles* are applicable to decision-making by investors.⁷⁸ The report states that institutional investors have a vital role to play in respecting human rights, and the *Guiding Principles* are the “global authoritative standard” in this area.⁷⁹

[94] In other words, the evidence filed in this judicial review provides good reason for the respondent to reassess whether there is a role for the *Guiding Principles* in its policy documents.

Second ground of review — lawfulness of a failure to divest

[95] The second ground of review is pleaded in the alternative. The ground as pleaded is that the failure of the Guardians to divest the challenged investments directly breaches the duty in s 58(2) to manage and administer the fund in a manner consistent with avoiding prejudice to New Zealand’s international reputation.

[96] At the hearing, counsel said the applicants do not challenge any actual decision of the Guardians not to divest the challenged investments, because the evidence from Guardians is that they have made no such decision. Rather, counsel emphasised the claim for a declaration that the Guardians have unlawfully failed to give proper consideration to divesting the challenged investments.

⁷⁸ Working Group on the issue of human rights and transnational corporations and other business enterprises *Taking stock of investor implementation of the Guiding Principles on Business and Human Rights* UN Doc A/HRC/47/39/Add.2 (17 June 2021).

⁷⁹ At 3.

[97] It is strictly unnecessary to consider this alternative ground of review. However, once legally compliant policy documents are in place, Guardians will inevitably have to make decisions about the challenged investments in accordance with those policy documents. As the applicants argued, the relevant businesses have attracted international attention given their activities in the occupied Palestinian territories. The respondent admits that each of the challenged investments featured in the 2023 database update of the United Nations Office of the High Commissioner for Human Rights. Specifically:

- (a) Two of the companies were listed as being involved in the provision of services and utilities supporting the maintenance and existence of settlements, including transport;
- (b) One of the companies was listed as the parent of a company involved in the provision of services and utilities supporting the maintenance and existence of settlements, including transport; and
- (c) One of the companies is listed as a parent of a company involved in both the provision of services and utilities supporting the maintenance and existence of settlements including transport, and the supply of security services, equipment and materials to enterprises operating in settlements.

[98] Being listed on the database does not amount to a legal finding. But it does provide a good faith basis for further enquiry. Guardians will need to assess the factual position once compliant policies are in place, but on the face of it I doubt it would be legally justifiable to refuse to make decisions about the treatment of the challenged investments.

[99] For completeness, I record that in my view if there is any future challenge to such decisions, the companies involved should be notified and given an opportunity to participate in the proceedings if they wish. I accept the respondent's submission that natural justice would require that step to be taken.

Relief

[100] The applicants sought the following relief under the first ground of review:

- (a) A declaration that the policy documents are unlawful;
- (b) A declaration that the decisions to invest in the challenged investments were unlawful;
- (c) A declaration that the decisions not to divest the Fund from the challenged investments were unlawful;
- (d) An order in the nature of mandamus requiring the Guardians to formulate new policies for investment and divestment of the fund which comply with their obligations as to ethical investment and avoidance of risk to New Zealand's international reputation.

[101] It is appropriate to make a declaration that the relevant aspects of the policy documents are unlawful for the reasons set out in this judgment. It follows as a matter of law that the respondent has a duty to reformulate the policy documents consistently with the Act. It is not necessary to make an order in the nature of mandamus to require the Guardians to do so.

[102] At the hearing the applicants largely backed off seeking declarations (b) or (c). I am satisfied that the best course is to allow the Guardians to make decisions about the challenged investments pursuant to legally compliant policy documents.

Conclusion

[103] I grant the application for judicial review and make a declaration that, for the reasons set out in this judgment:

- (a) part nine of the statement of investment policies, standards, and procedures; and
- (b) the sustainable investment framework

do not comply with the requirements of ss 58(2)(c) and 61(d) of the New Zealand Superannuation and Retirement Income Act 2001 and are unreasonable and unlawful.

[104] The applicants are entitled to costs. If the parties cannot agree, the applicant is to file a memorandum of no more than five pages within **10 working days**. The respondent is to file a reply memorandum within a **further 10 working days**. I will then determine costs on the papers.

Mount J